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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
800 Data Base Access Tariffs	)	CC Docket No. 93-129
and the 800 Service	)	
Management System Tariff	)	

OPPOSITION OF NATIONAL DATA CORPORATION

National Data Corporation ("National Data"), by its attorneys, hereby opposes the petitions for waiver which several of the Bell Operating Companies and certain other local exchange carriers ("participating LECs"),[1] U S West Communications, Inc.,[2] and GTE Service Corporation[3] (collectively, "the LECs") filed in the above-captioned proceeding in response to the Commission's Order ("Designation Order") of July 19, 1993.[4] In their petitions, the LECs have asked the Commission to waive the requirement that the LECs disclose the computer models used to establish their respective basic 800 data base access rates. As set forth below, the LECs' petitions should be denied.

1/ See Petition for Waiver of the Participating Bell Operating Companies, Cincinnati Bell and Southern New England Telephone Company, CC Docket No. 93-129 (filed Sep. 16, 1993) [hereinafter "Participating LECs' Petition"].

2/ See Contingent Petition for Waiver of U S West Communications, Inc., CC Docket No. 93-129 (filed Sep. 17, 1993).

3/ See Petition for Waiver of GTE Service Corporation, CC Docket No. 93-129 (filed Sep. 20, 1993).

4/ See Provision of Access for 800 Service, 8 FCC Rcd 5132 (1993) [hereinafter "Designation Order"].

I. THE COMMISSION SHOULD DENY THE LECS' PETITIONS WITHOUT REACHING THE MERITS, BECAUSE THE LECS HAVE ALTERNATIVE MEANS OF SATISFYING THEIR OBLIGATIONS TO JUSTIFY THEIR RATES.

The Commission initiated this investigation because it was presented with substantial evidence that the LECs had unlawfully attributed costs to basic 800 data base access in developing the tariffs which they filed with the Commission on March 1, 1993. As National Data and others pointed out, the LECs had proposed rates for basic 800 data base access that were based on costs other than those "incurred specifically" for the implementation and operation of data base access.[5] The Commission subsequently suspended the LECs' tariff transmittals for one day, imposed accounting orders, and initiated an investigation of the LECs' 800 data base tariffs.[6]

Soon thereafter, the Commission issued the Designation Order, in which it set forth the issues to be examined in this proceeding. Among other things, the Commission required the LECs to disclose detailed cost support for their proposed rates. Recognizing the importance of the LECs' cost models to the resolution of the issues raised by the Designation Order, the Commission also specifically required each of the LECs to disclose the computer model used to establish their respective basic 800 data base access rates.[7] Chief among these models is the Common Channel Signalling Cost Information System ("CCSCIS"), a computer model developed by Bell Communications Research, Inc. ("Bellcore") and used by the participating LECs. Mindful of the LECs' concerns about the

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5/ See, e.g., Consolidated Petition to Reject or, in the Alternative, to Suspend and Investigate of National Data Corporation, CC Docket No. 86-10, at 6-9 (filed Mar. 18, 1993).

6/ See 800 Data Base Access Tariffs and the 800 Service Management System Tariff, 8 FCC Rcd 3242 (1993).

7/ See Designation Order, 8 FCC Rcd at 5135-36 n.24.

confidentiality of their cost models, the Commission afforded each LEC that preferred not to disclose its cost model the option of using other means to justify its proposed rates.

In their petitions, the LECs have asked the Commission to allow them to withhold their cost models from public view. In support of their requests, the LECs argue that their cost models are "trade secrets" and confidential commercial information within the meaning of the Freedom of Information Act ("FOIA") and are thus protected from disclosure. In doing so, however, the LECs have failed to come forward with any other means of justifying their rates. In essence, the LECs are seeking to protect their proposed rates from meaningful review. Without their cost models or other methodology to provide some context for the cost data which they have produced, the information accompanying the LECs' direct cases is virtually meaningless. The LECs' petitions should therefore be denied.

To begin with, the LECs have selectively ignored the Commission's Designation Order. In that order, the Commission explained that:

> price cap LECs using computer models to develop costs in their direct cases must disclose those models on the record if their justification for their rates is based on the use of the model. If a carrier prefers not to disclose the model it used to allocate costs, it must provide some other justification for its rates. Carriers are free to develop their exogenous costs by other methods, provided that those methods are disclosed on the record. [8]

Although their petitions are couched in terms of a waiver of the requirement that they disclose their cost models, the LECs are in reality attempting to avoid disclosure altogether.

In directing the LECs to disclose their cost models or provide other justification for their basic 800 data base access rates, the Commission distinguished its previous decision in the Open Network Architecture ("ONA") proceeding, in which the Commission ruled that the carriers' Switching Cost Information System was protected from public

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8/ Id. (Emphasis added.)

disclosure. In particular, the Commission emphasized that in this proceeding -- unlike the ONA rulemaking -- the LECs have alternative means of justifying their rates, especially their basic 800 data base access rates. The Commission based this conclusion on the fact that at least two of the LECs, Pacific Bell and Southwestern Bell, did not use CCSCIS or a similar computer model to develop their basic data base access rates. Given the demonstrated availability of alternative cost methodologies and the public interest in full disclosure, the Commission required the LECs to either disclose their cost models or use other means to justify their rates.

In their petitions and earlier ex parte filings, the LECs do not take issue with the Commission's finding that at least two carriers have used means other than cost models in computing their basic 800 data base access rates. Indeed, the LECs appear careful to assert only that such cost models are neccessary to compute vertical rates.[9] Therefore, with respect to basic 800 data base access rates, the Commission's logic in mandating the disclosure of the LECs' cost models or alternative means of justifying their rates remains unchallenged. LECs preferring not to disclose their cost models are free -- indeed, they are required -- to fulfill their disclosure obligation by supplying other means of justifying their rates. Given the demonstrated and undisputed availability of alternative means of justifying their basic 800 data base rates, the LECs' petitions are irrelevant. The Commission should therefore summarily reject the LECs' petitions, without addressing the merits.

9/ See Participating LECs' Petition at 2-3; Letter from James F. Britt, Executive Director of Bellcore to Donna R. Searcy (filed Aug. 3, 1993).

II. EVEN IF THE COMMISSION REACHES THE MERITS OF THE LECS' PETITIONS, THEY SHOULD NONETHELESS BE DENIED. A REASONABLE PROTECTIVE ORDER SHOULD SATISFACTORILY ADDRESS THE LECS' CONFIDENTIALITY CONCERNS.

Even if the Commission were to find it necessary to address the merits of the LECs' petitions, they should nonetheless be denied. The LECs have not come close to meeting their burden of proof. They certainly have not shown by a preponderance of the evidence that their cost manuals are protected from disclosure.[10] Moreover, sound public policy dictates that the LECs should not be permitted to develop and justify rates using "secret" formulas which they can withhold from public scrutiny. The LECs, after all, are public utilities. Having raised these formulas in defense of their published rates, they should not now be heard to object to the public testing of their defense.[11] Simple equity requires nothing less. Further, granting the LECs' petitions would have a significant, negative impact on future ratemaking proceedings. Allowing the LECs to withhold their cost models -- which will assume increasing importance as the LECs implement their intelligent networks -- will efffectively preclude informed public participation in the Commission's tariff review processes.

The Commission, however, need not reach the issue whether the LECs' cost models are trade secrets or confidential information within the meaning of the FOIA. Assuming for purposes of argument that the models are protected by the FOIA, the public

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10/ See 47 C.F.R. § 0.457(d) (1992).

11/ In other areas of law, this proposition is uniformly accepted as the only just and logical result. For example, in the context of the physician-patient privilege, the general rule is that a patient voluntarily placing his or her physical or mental condition in issue in a judicial proceeding waives the privilege with respect to information relating to that condition. See, e.g., City and County of San Francisco v. Superior Court, 231 P.2d 26, 28 (1951). Similarly, the LECs, in seeking to introduce new rates, are not entitled to argue that the underlying cost methodology used to develop such rates should be withheld from disclosure.

interest in the disclosure of these models clearly overrides any competitive harm to the LECs. As the Commission has previously explained:

> The Commission has exercised its discretion to release confidential commercial or financial information when it has been persuaded that the information was necessary to the resolution of matters at issue in Commission hearings, or when the information was submitted by a party as part of its case in a proceeding of a sort traditionally conducted on the basis of an open public record. On the other hand, the information is generally not released when sought for use in resolving essentially private disputes, or when its relevance to a matter in issue before the Commission has not been clearly demonstrated.[12]

In this case, access to the cost models is an absolute prerequisite for the consideration of the issues designated for investigation. Absent full disclosure, informed comment on the reasonableness of the LECs' proposed rates for basic 800 data base access is virtually impossible. Disclosure of the models would reveal critical information about how the LECs' rates have been established. Without this information, interested parties are precluded, as a practical matter, from participating in any meaningful way in the Commission's investigation. Fundamental fairness prohibits such a result.

This is not to say that the Commission should disregard the LECs' concerns about the public disclosure of information which they claim to be confidential. In the past, the Commission has responded to such concerns by issuing protective orders. Through reasonable protective orders, which National Data and its experts are willing to accept, the Commission can ensure that interested parties have access to critical information not in the public record while, at the same time, ensuring that these parties do not disclose confidential information to third parties or use it for competitive purposes.

The Commission issued just such an order in the context of the Shared Network Facilities Arrangement ("SNFA") investigation. In that proceeding, the Commission

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12/ MCI Telecommunications Corp., FOIA Control No. 84-144, FCC No. 85-266, at 6 (May 17, 1985).

determined that inter-carrier SNFA contracts to which MCI sought access, while exempt from mandatory FOIA disclosure because disclosure posed the risk of competitive harm, should be disclosed because they were relevant to the Commission's investigation of SNFA contracts and special access rates. The Commission thus directed the Office of General Counsel to prescribe a protective order that would prevent MCI, the party seeking access, from revealing confidential SNFA materials to third parties or using them for competitive purposes.[13]

With such an ameliorative remedy available to the Commission, any other option short of providing full disclosure is woefully inadequate and would constitute reversible error.[14] The "alternative" proposed by the participating LECs is really no alternative at all.[15] In their petition, they propose to provide the Common Carrier Bureau -- and only the Common Carrier Bureau -- with access to CCSCIS software and documentation. Interested parties who sign nondisclosure agreements would only be permitted access to redacted documentation which would not contain such information as vendor equipment prices, resource consumption figures, equipment capacities, or algorithms and other information considered proprietary by Bellcore.[16] Their proposal is wholly inadequate. Redacted versions of the cost models are hardly more useful than complete nondisclosure. In effect, the participating LECs' proposal would have the Common Carrier Bureau review the record and reach a decision on an ex parte basis, denying interested parties the right to participate and depriving the Commission of the benefits of the adversarial process.

By contrast, a protective order could be tailored to ensure access by a limited number of individuals under strict nondisclosure requirements. The Commission could

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13/ Id. at 12.

14/ See, Getman v. National Labor Relations Board, 450 F.2d 670 (1971).

15/ See Participating LECs' Petition at 9-12.

16/ Id. at 10-11.

issue a protective order setting forth the terms and conditions under which particular persons associated with interested parties (e.g., counsel and associated personnel) would be permitted access to the LECs' cost models. Each such individual could be required to sign a nondisclosure agreement. Likewise, the Commission could require that any portions of a pleading filed in administrative or judicial proceedings which contain confidential information be physically separated from the rest of the pleading, identified as confidential and withheld from the public record. Additional reasonable restrictions on disclosure might also be appropriate. The LECs have not explained how they would be harmed by the disclosure of their cost models pursuant to such a protective order. The reason for their silence is clear; they cannot show any harm.

The mandate of the Administrative Procedure Act that administrative decisions be reached upon a public record, the requirements of due process, and fundamental fairness all dictate that the LECs' cost models be disclosed pursuant to a protective order. The carriers' objections to such a result is nothing short of unreasonable.[17]

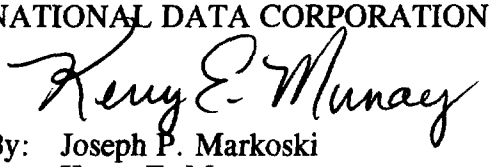
17/ One can only imagine the LECs' howls of protest if roles were reversed, and the Commission were to prescribe rates pursuant to an undisclosed cost model or one that was only made available to the LECs on a redacted basis.

III. CONCLUSION

For all of the reasons set forth above, the Commission should reject the LECs' petitions. Should the Commission nonetheless find that the LECs' cost models are protected from disclosure, the Commission should require the LECs to disclose their cost models to interested parties pursuant to a protective order prescribed by the Commission.

Respectfully submitted,

NATIONAL DATA CORPORATION



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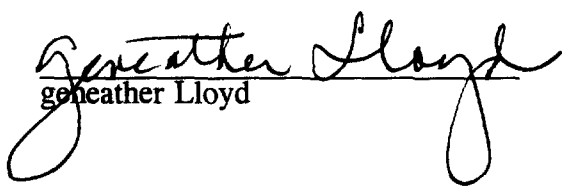
October 12, 1993

CERTIFICATE OF SERVICE

I, geneather Lloyd, hereby certify that copies of the foregoing Opposition of National Data in CC Docket No. 93-129, were served by hand or by First-Class United States mail, postage prepaid, upon the parties appearing on the attached service list, this 12th day of October, 1993.



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